being injured until her death nearly a year later she was unconscious and without pain and without appreciation of what had happened to her. In an action by her father as administrator of her estate general damages of £2,500 were awarded, of which £500 was for loss of expectation of life and £2,000 for loss of faculty. The Court of Appeal affirmed the award. In our view damages for loss of expectation of life and damages for loss of faculty were damages properly assessed under the Law Reform (Miscellaneous Provisions) Act 1934. The report does not show that damages were also assessed under the Fatal Accident Act, and therefore in that case there would be no question of or necessity for any deduction in the damages assessed.

Davies' case was followed in this country in the case of *Tan Chooi Thin & Anor.* v. *Teo Whee Hong*[3] in which claims were brought under the Civil Law Ordinance Cap. 42 of the Straits Settlement. *Lok Yin* v. *Pat Thoo*[4] was another case in which the same principle was adopted. In *Feay* v. *Barnwell*[5] a woman was killed in a street accident as the result of the defendant's negligence. Damages were assessed at £625 under the Fatal Accidents Act 1846, and at £600 under the Law Reform (Miscellaneous Provisions) Act 1934 in respect of pain and suffering and loss of expectation of life. The net amount of damages in respect of pain and suffering and loss of expectations of life of £575 (after reduction of £25 for administration expenses) was deducted from the £625 damages under the Fatal Accidents Act and the balance sum of £50 was awarded to the plaintiff under the Fatal Accidents Act together with the £600 damages under the Law Reform Act.

Therefore we hold that the damages of $20,000 for pain and suffering assessed in this case under section 8 should be taken into account in the assessment of damages under section 7. This means that the plaintiffs should be awarded damages of $32,200 only under sections 7 and 8 apart from the special damages of $1,850. We order that the judgment amount be reduced accordingly. To that extent this appeal is allowed, with costs to the appellant. We also order that the deposit be refunded to him.

Order accordingly.

Solicitors: *A.K.J. D'Cruz & Co.; R.K. Nathan & Co.*

NG YAU THAI v. PUBLIC PROSECUTOR

[S.C. (Seah, Hashim Yeop A. Sani & Wan Hamzah S.C.JJ.) September 22, 1986 & February 7, 1987]

[Kuala Lumpur – Supreme Court Criminal Reference No. 1 of 1986]

Evidence – Accomplice – Evidence of – Need for corroboration – Danger of accepting uncorroborated evidence of accomplice – Magistrate convicting on such evidence must have risk of so doing in his mind and indicate accordingly in his judgment – Evidence Act, 1950, s. 114(b) and 133 – Courts of Judicature Act, 1964, s.66.

In this case the following question of law was referred to the Supreme Court:

"Whether or not the High Court was right in ruling owing to the strenuous submission made by defence counsel at the Magistrate's Court on the question of the danger of accepting the uncorroborated testimony of an accomplice, the Court must have had the risk in its mind before accepting the uncorroborated testimony of the accomplice without requiring some indication in the judgment itself that the magistrate had this rule of caution in mind."

In his judgment dismissing the appeal from the learned magistrate the learned judge had stated that he was satisfied that the learned magistrate had clearly in her mind the warning concerning the risk of accepting the uncorroborated testimony of an accomplice and that this was clearly borne out by the notes of the evidence of the case in the court below.

Held: (1) in such a case where the trial judge has convicted on the uncorroborated evidence of an accomplice, the mind of the trial judge can only be gathered from the contents of his judgment and nowhere else. To look elsewhere to try to ascertain the judge's mind would be tantamount to taking irrelevant matters into consideration;

(2) if the subjective satisfaction of the trial magistrate was based on the notes of submission of learned counsel for the accused and the learned Deputy Public Prosecutor instead of the written judgment, then the learned judge hearing the appeal had misdirected himself on the law;

(3) in this case in fact the trial magistrate had in mind such warning concerning the risk of accepting the uncorroborated testimony of an accomplice and this was clearly indicated in her judgment;

(4) although the answer to the certified question is that the High Court was wrong in law to hold that the warning need not appear in the judgment or grounds of decision of the trial magistrate, however in this case the warning did appear in the judgment and the appeal should be dismissed.

Cases referred to:

(1) *Bereng Griffith Lerotholi & Ors.* v. *The King* [1950] A.C. 11.
(2) *Chiu Nang Hong* v. *Public Prosecutor* [1965] 1 M.L.J. 40.
(3) *R.* v. *Spencer* [1986] 2 All E.R. 928, 937.

SUPREME COURT.

Karpal Singh for the appellant.

Tan Hock Chuan (Deputy Public Prosecutor) for the respondent.

Cur. Adv. Vult.

Seah S.C.J. (delivering the Judgment of the Court): This is a reference under section 66 of the Courts of Judicature Act 1964 and the certified question of law of public interest reads:

"Whether or not the High Court was right in ruling owing to the strenuous submission made by defence counsel at the Magistrate's Court on the question of the danger of accepting the uncorroborated testimony of an accomplice, the Court must have had the risk in its mind before accepting the uncorroborated testimony of the accomplice without requiring some indication in the judgment itself that the Magistrate had this rule of caution in mind."

The law in Malaysia which deals with the evidence of an accomplice who gives testimony for the prosecution is contained in section 133 and section 114 illustration (b) of the Evidence Act 1950. For the purpose of this reference we do not find it necessary to discuss the combined effect of these two sections and illustration (b), except to answer the certified question placed before this Court.

In *Bereng Griffith Lerotholi & Ors.* v. *The King*[1] the appellants were found guilty of and sentenced to death for the murder (alleged to be a ritual murder) on March 4, 1948, of one Meleke Ntai, a brother or cousin of one of the appellants, who was alleged to have sold Meleke Ntai for £100 as "medicine." Lord Reid in delivering the judgment of the Privy Council said at pp. 13-14:

"The law in Basutoland with regard to accomplice evidence is enacted in section 231 of the Basutoland Criminal Procedure and Evidence Proclamation 1938; that section was amended by the Basutoland Criminal Procedure and Evidence (Amendment) Proclamation 1944 and the amended section is as follows:

'Any court which is trying any person on a charge of any offence may convict him of any offence alleged against him in the indictment or summons on the single evidence of any accomplice:

Provided that the offence has, by competent evidence, other than the single and unconfirmed evidence of the accomplice, been proved to the satisfaction of such court to have been actually committed.' "

At page 21 Lord Reid continued:

"It is not disputed, and there is no doubt, that a judge in Basutoland, as elsewhere, must always have in mind the danger of accepting accomplice evidence which is uncorroborated by independent evidence: the question is whether a judge in Basutoland must apply the rule of English practice as laid down by the Court of Criminal Appeal in *Rex* vs. *Baskerville* [1916] 2 K.B. 658. In the present case the learned judge who convicted the appellants was referred to the cautionary rule which is followed in South Africa and he appears to have been guided by it. That rule has been stated by Schreiner J.A. in *Rex* vs. *Ncanana* (1948) 4 S.A. L.R. 399 in the following terms: "The cautious court or jury will often properly acquit in the absence of other evidence connecting the accused with the crime, but no rule of law or practice requires it to do so. What is required is that the trier of fact should warn himself, or, if the trier is a jury, that it should be warned, of the special danger of convicting on the evidence of an accomplice; for an accomplice is not merely a witness with a possible motive to tell lies about an innocent accused but is such a witness peculiarly equipped, by reason of his inside knowledge of the crime, to convince the unwary that his lies are the truth. This special danger is not met by corroboration of the accomplice in material respects not implicating the accused, or by proof aliunde that the crime charged was committed by someone; so that satisfaction of the requirements of section 285 (the section in the South African Act corresponding to section 231 in Basutoland) does not sufficiently protect the accused against the risk of false incrimination by an accomplice. The risk that he may be convicted wrongly although section 285 has been satisfied will be reduced, and in the most satisfactory way, if there is corroboration implicating the accused. But it will also be reduced if the accused shows himself to be a lying witness or if he does not give evidence to contradict or explain that of the accomplice. And it will also be reduced, even in the absence of these features, if the trier of fact understands the peculiar danger inherent in accomplice evidence and appreciates that acceptance of the accomplice and rejection of the accused is, in such circumstances, only permissible where the merits of the former as a witness and the demerits of the latter are beyond question."

Lastly, Lord Reid observed at page 23:

"The cautionary rule is concerned neither with the admissibility of evidence nor with the competency, examination or cross-examination of witnesses, and this section cannot therefore be authority for requiring the adoption of the English cautionary rule. No other legislative provision in force in Basutoland was suggested as containing such authority. *Their Lordships are now satisfied that the South African cautionary rule is properly applicable in Basutoland, and that it was present to the mind of the learned judge who convicted the appellants and properly applied by him in his case.* The appeal must therefore fail on this ground also." [Emphasis given]

In this case, on appeal to the High Court at Kuala Lumpur, reliance was placed by the learned judge on the case of *Chiu Nang Hong* v. *Public Prosecutor*[2]. That was a case where the appellant was convicted of rape on the basis that the complainant's allegation was corroborated when it was not. The Privy Council allowed the appeal of the appellant holding that there was a miscarriage of justice and that they were justified in intervening. In

giving the judgment of the Privy Council Lord Donovan observed at page 43:

"Their Lordships would add that even had this been a case where the learned judge had in mind the risk of convicting without corroboration, but nevertheless decided to do so because he was convinced of the truth of the complainant's evidence, nevertheless they do not think that the conviction could have been left to stand. For in such a case a judge, sitting alone, should in their Lordships' view, make it clear that he has the risk in question in his mind, but nevertheless is convinced by the evidence, even though uncorroborated, that the case against the accused is established beyond any reasonable doubt. *No particular form of words is necessary for this purpose; what is necessary is that the judge's mind upon the matter should be clearly revealed.*" [Emphasis given]

In our judgment, the mind of the trial judge can only be gathered from the contents of his judgment and nowhere else. To look elsewhere to try to ascertain the judge's mind would tantamount to taking irrelevant matters into consideration.

Now, after quoting the last sentence of Lord Donovan's *dictum* at page 43 which reads:

"No particular form of words is necessary for this purpose: what is necessary is that the judge's mind upon the matter should be clearly revealed."

the learned judge continued:

"I think those were apt words and I am satisfied that the Magistrate had clearly in her mind the warning concerning the risk of accepting the uncorroborated testimony of an accomplice. *This is clearly borne out in the note of the evidence of the case in the court below.*" [Emphasis given]

If the subjective satisfaction of the trial Magistrate were based on the notes of submission of learned counsel for the accused and the learned Deputy Public Prosecutor instead of the written judgment, then in our opinion, the learned judge hearing the appeal had misdirected himself on the law. On the other hand, should there be an ambiguity upon such an important matter it ought, in our view, to be resolved in favour of the accused where the liberty of the subject is involved [see *Chiu Nang Hong* case at page 43C].

Now, in his judgment the learned judge did not make any reference to the grounds of decision of the trial Magistrate; and if he had done so he would have found that the trial Magistrate had in mind such warning and this was clearly indicated in her judgment. The trial Magistrate said:

"PW1 (Thee Sok Len) and his wife PW2 were accomplices. They knew that the sale and purchase of the baby was an offence under the law. Because they were accomplices the Court may presume under section 114, illustration (b), of the Evidence Act 1950 that their evidence is unworthy of credit unless they are corroborated in material particulars. The evidence of PW1 cannot be corroborated by the evidence of his wife PW2 because PW2 was also an accomplice."

Then the trial Magistrate referred to the following provisions of section 133 of the Evidence Act:

"An accomplice shall be a competent witness against an accused person; and a conviction is not illegal merely because it proceeds upon the uncorroborated testimony of an accomplice."

After alluding to a passage in *Sarkar's* Law of Evidence dealing with the subject of evidence of an accomplice and corroboration, the trial Magistrate stated that she accepted the evidence of PW1 and PW2, and she gave the reason for doing so as follows:

"There is no reason for them (*i.e.* PW1 and PW2) to tell lies in Court. On the other hand if they tell the truth they themselves stand to lose because they would be ordered to return the baby."

The warning as to the danger of convicting on uncorroborated evidence if the prosecution is relying on the testimony of an accomplice does not involve some legalistic ritual to be automatically recited by the trial Magistrate, or that some particular form of words or incantation has to be used and if not used, the judgment is deemed to be faulty and the conviction set aside. There is no magic formula and no set words which must be adopted to express the warning. Rather must the good sense of the matter be expounded with clarity and in the setting of a particular case [see the judgment of Lord Ackner in *R.* v. *Spencer*[3]]. Although the answer to the certified question is that the High Court was wrong in law to hold that the warning need not appear in the judgment or grounds of decision of the trial Magistrate, however, having regard to what we have stated above, we agree with the learned judge that the appeal be dismissed and the conviction be affirmed.

Order accordingly.

Solicitors: *Karpal Singh & Co.*